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No. 79-1820

In the Supreme Court of the United States

OCTOBER TERM, 1979

GEORGE H. BADGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Hansford v. *United States*, 303 F. 2d 219 4

Kadis v. *United States*, 373 F. 2d 370 4

Lopez v. *United States*, 373 U.S. 427 4

Munroe v. *United States*, 424 F. 2d 243 3

United States v. *Buckley*, 586 F. 2d 498, cert. denied, 440 U.S. 982 4

United States v. *Christopher*, 488 F. 2d 849 4

United States v. *Demma*, 523 F. 2d 981 4

United States v. *DeVore*, 423 F. 2d 1069, cert. denied, 402 U.S. 950 4

United States v. *Greenfield*, 554 F. 2d 179, cert. denied, 439 U.S. 860 4

United States v. *Johnston*, 426 F. 2d 112 4

United States v. *Perry*, 478 F. 2d 1276, cert. denied, 414 U.S. 1005 5

United States v. *Rodrigues*, 433 F. 2d 760, cert. denied, 401 U.S. 943 4

United States v. *Russell*, 411 U.S. 423 5

United States v. *Shameia*, 464 F. 2d 629, cert. denied, 409 U.S. 1076 4

Page

Cases—(Continued):

United States v. *Tharpe*, 443 F. 2d 12, cert. denied, 404 U.S. 866 5

United States v. *Watson*, 489 F. 2d 504 4

Statue:

18 U.S.C. 201(b)(1) 1

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Petitioner contends that the jury should have been instructed concerning the defense of entrapment.

1. After a jury trial in the United States District Court for the District of Utah, petitioner was convicted of attempted bribery of an IRS agent, in violation of 18 U.S.C. 201(b)(1). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 11-20).

The evidence at trial showed that petitioner, aided by co-defendant Betty Mildenhall,[1] offered IRS Agent Thomas Harkness a $20,000 bribe to close a criminal tax

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[1]Mildenhall was also convicted and was sentenced to two years' imprisonment. Her conviction was also affirmed on appeal, but she has not filed a petition for a writ of certiorari.

fraud investigation that Harkness was conducting concerning petitioner. Mildenhall was a secretary in the Salt Lake City IRS office; Harkness suspected her of leaking information to petitioner about the investigation (Pet. App. 13, 15).

On September 15, 1977, Mildenhall whispered to Harkness that petitioner would be willing to pay him $100,000 to close the investigation (Pet. App. 13-14; Tr. 51). Harkness immediately reported this overture to his superior, and the IRS Internal Security Division was contacted (Pet. App. 14; Tr. 52, 55). Harkness was then directed to telephone Mildenhall at home that evening in order to determine whether her offer was serious (Tr. 56, 207). He was also instructed not to bring up the subject of the bribe offer but rather to call her and discuss their mutual problems with a supervisor (Pet. App. 14; Tr. 56-57). During the course of this conversation, which was recorded, Mildenhall again suggested that Harkness "make a deal" with petitioner, and Mildenhall also asked Harkness if he would be willing to take a bribe (Pet. App. 14; Tr. 69-71).

After additional conversations to set up a meeting, Harkness met with petitioner at Mildenhall's home on September 20 (Pet. App. 14; Tr. 73-80). Petitioner told Harkness that he wanted the criminal case "put to bed" (Tr. 83, 85) and, after discussing various ways in which Harkness could be rewarded, eventually suggested a $20,000 payment (Pet. App. 14-15; Tr. 81-88). Petitioner also sought assurances from Harkness that he would remove the most damaging evidence from his file so that it would be too difficult to reconstruct a case against him should anyone want to do so in the future (Tr. 90). After several inquiries from Mildenhall in the next few days about the status of petitioner's case, Harkness wrote a fictitious closing report and showed it to Mildenhall (Pet.

App. 15; Tr. 91-98). On September 29, Harkness again met with petitioner at Mildenhall's home. Petitioner counted out $1,000 and said that the rest would be paid through a Swiss bank account. Harkness handed Mildenhall a copy of the false closing report, and she gave Harkness the money (Pet. App. 15; Tr. 98-101).

Mildenhall testified in her own defense and said that Harkness made the first overture to her, asking if petitioner would make a deal with him and stating that he could discontinue the investigation against petitioner (Pet. App. 16; Tr. 252, 258-259). Mildenhall denied any knowledge of a bribe attempt and testified that she set up the meetings so that petitioner could help Harkness establish a private accounting practice (Pet. App. 16; Tr. 257-264, 272-273). Petitioner did not testify at trial.

During the conference on instructions, petitioner's counsel requested an entrapment charge, apparently conceding that petitioner admitted the facts of the instant attempted bribery offense but denying any criminal intent on petitioner's part (Pet. App. 15-16).[2] Government counsel argued that there was insufficient evidence of entrapment as to petitioner to warrant an entrapment instruction (Tr. 300, 303, 310-311). The district court refused to instruct on the defense of entrapment. The court of appeals affirmed on the basis of its en banc decision in *Munroe* v. *United States*, 424 F. 2d 243, 244 (10th Cir. 1970), which held that an entrapment instruction should not be given unless a defendant admits all the elements of the crime, including criminal intent (Pet. App. 16-17). Judge McKay dissented; he was of the

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[2]We say "apparently" because the transcript reads that counsel "do[es] *not* want for the record to say that [petitioner] is prepared to admit that he did do all of the acts that were necessary to constitute the crime of bribery * * *" (Tr. 310; emphasis added).

view that a defendant need not admit criminal intent in order to receive an entrapment instruction (Pet. App. 18-20).

2. Petitioner contends (Pet. 5-10) that he was entitled to an entrapment instruction because he admitted through counsel that he had committed the acts that formed the basis for the crime. While there is a conflict in the circuits as to whether a defendant must admit or may deny criminal acts and still claim entrapment,[3] this case is not an appropriate one for resolving that conflict, for petitioner presented no evidence of entrapment at trial.

Although a defendant is not required to testify at trial in order to present a colorable entrapment claim, he still bears the burden of presenting some evidence either of inducement or persuasion on the part of the government, or of unwillingness on his part to commit the crime. See *United States* v. *Buckley*, 586 F. 2d 498, 501 (5th Cir. 1978), cert. denied, 440 U.S. 982 (1979); *United States* v. *Christopher*, 488 F. 2d 849, 850-851 (9th Cir. 1973); *United States* v. *DeVore*, 423 F. 2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971); *Kadis* v. *United States*, 373 F. 2d 370, 374 (1st Cir. 1967). Even assuming *arguendo* the truth of co-defendant Mildenhall's testimony, *i.e.*, that she had set up a legitimate meeting on September 20 between Harkness and petitioner concerning a private CPA practice for Harkness, and that she had

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[3]Compare, *e.g.*, *United States* v. *Demma*, 523 F. 2d 981 (9th Cir. 1975) (en banc); *Hansford* v. *United States*, 303 F. 2d 219 (D.C. Cir. 1962) (en banc), with *United States* v. *Greenfield*, 554 F. 2d 179 (5th Cir. 1977), cert. denied, 439 U.S. 860 (1978); *United States* v. *Watson*, 489 F. 2d 504 (3d Cir. 1973); *United States* v. *Shameia*, 464 F. 2d 629 (6th Cir.), cert. denied, 409 U.S. 1076 (1972); *United States* v. *Rodrigues*, 433 F. 2d 760 (1st Cir. 1970), cert. denied, 401 U.S. 943 (1971); *United States* v. *Johnston*, 426 F. 2d 112 (7th Cir. 1970).

passed along to petitioner Harkness' statement that he could discontinue the criminal investigation, this at the most shows that the government merely presented petitioner with the opportunity to incriminate himself. See *Lopez* v. *United States*, 373 U.S. 427 (1963).

It is uncontroverted that at the September 20 meeting petitioner, not Harkness, asked about closing the criminal case, inquired what method of reward Harkness preferred, and sought assurances that damaging evidence would be removed from petitioner's file (Pet. App. 14-15). The best evidence of petitioner's predisposition is that of the September 20 and 29 conversations, which were recorded; nothing in them indicates any importuning on the part of Harkness or any unreadiness on the part of petitioner. Harkness' activity failed even to constitute solicitation, and yet solicitation alone is not sufficient to show entrapment. See, *e.g.*, *United States* v. *Perry*, 478 F. 2d 1276, 1278 (7th Cir.), cert. denied, 414 U.S. 1005 (1973); *United States* v. *Tharpe*, 443 F. 2d 12, 13 (4th Cir.), cert. denied, 404 U.S. 866 (1971). In sum, since there was no evidence to show that the government "actually implant-[ed] the criminal design in the mind of the defendant" (*United States* v. *Russell*, 411 U.S. 423, 436 (1973)), petitioner was not entitled to an entrapment instruction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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